SUPREME COURT, U.S.
FILED
FEB 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-870

FORD MOTOR COMPANY,

Appellant,

v.

WILLIAM T. COLEMAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC., IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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February 6, 1976

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INTEREST OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC,

Automobile Importers of America, Inc. (AIA) is a trade association organized as a non-profit District of Columbia corporation. Its Members import into,[1] or

[1] Alfa Romeo, Inc.
BMW of North America, Inc.

[Footnote continued]

manufacture for export to,[2] the United States the following makes of vehicles: Alfa Romeo, Alfetta, Arrow, Austin, BMW, Bentley, Citroen, Colt, Datsun, Fiat, Honda, Jaguar, Jensen, Lancia, Lotus, MG, Mazda, Peugeot, Renault, Rolls-Royce, Saab, Subaru, Toyota, Triumph and Volvo. The sales volumes of these vehicles range from the highest among imports to those too low to be listed among the top twenty-one imports.[3] Associate Members[4] of AIA are manufacturers of parts for

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British Leyland Motors Inc.
Citroen Cars Corporation
Fiat Motor Company, Inc.
American Honda Motor Co., Inc.
Mazda Motors of America, Inc.
Nissan Motor Corp. in U.S.A.
Peugeot, Inc.
Renault, Inc.
Rolls-Royce Motors Inc.
Saab-Scania of America, Inc.
Subaru of America, Inc.
Toyota Motor Sales, U.S.A., Inc.
Volvo of America Corporation

Except for Subaru of America, Inc., these companies are wholly owned subsidiaries of the manufacturers of the vehicles they import.

2 Jensen Motors Ltd.
Lotus Cars Limited
Mitsubishi Motors Corporation

[3] Ward's Automotive Reports, Vol. 51, No. 2 (January 12, 1976), p. 10.

4 Bridgestone Tire Company of America, Inc.
Joseph Lucas North America Inc.
Michelin Tire Corporation
Nisonger Corporation
Pirelli Tire Corporation
Semperit of America, Inc.
Toyo Tire (U.S.A.) Corporation
Yokohama Rubber Co., Ltd.

imported and domestic motor vehicles whose products run the full range of parts from the smallest light bulb to tires.

All AIA Members and Associate Members are subject to the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. §§1391-1431) (Traffic Act) and regulations promulgated thereunder by the National Highway Traffic Safety Administration (the agency). The Traffic Act defines "manufacturer" as including importers (15 U.S.C. §1391(5)). While AIA Members and Associate Members are subject to the same provisions (15 U.S.C. §§1397, 1398, 1412 and 1415(c)) whose constitutionality is raised by Appellant Ford Motor Company (Ford), the risk of the two $800,000 penalties and costs of provisional notification is of much greater significance for them. Their respective shares of the market are far smaller than that of Ford, and the threatened penalties and costs are therefore far larger on a per unit basis.[5]

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[5] Ford's U.S. market share of passenger cars in 1975 was 22.95% whereas the largest share of an AIA Member was 3.3% (Toyota) and each of the four smallest shares of AIA Members was less than .006%, the smallest of those reported. Ward's Automotive Reports, *id.* pp. 10, 13.

THE FEDERAL CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL.

THE ENORMOUS RISKS IMPOSED BY THE TRAFFIC ACT UPON A MANUFACTURER SEEKING A DUE PROCESS HEARING CONCERNING AN ALLEGED SAFETY-RELATED DEFECT EFFECTIVELY DENY SUCH A HEARING.

A. The Risk of Incurring a Penalty of up to $800,000 in the Event of an Adverse Judicial Decision and the Risks of Incurring Either the Cost of a Provisional Notification or a Penalty of up to $800,000 for Failure to Notify, Effectively Deny Manufacturers a Due Process Hearing.

Initially, it is important to note the distinction between cases involving safety-related defects,[6] at issue herein, and cases involving compliance with the agency's safety standards, not at issue herein. Under the Traffic Act, compliance cases involve the failure to meet what the statute requires to be specific, objective equipment or motor vehicle standards whose performance is measured by objective tests. *Chrysler Corp. v. Dept. of Transportation,* 472 F.2d 659, 675 (6th Cir. 1972). Thus, the manufacturer should always be able to determine – *in advance* of offering the equipment or motor vehicle for sale – what is required and should have a precise test available as to whether it meets those requirements.

Defect cases are quite the opposite. There is not even a working definition available as to what is a safety-related defect, much less any objective test for determining in advance of post-sale agency review whether there is a

[6] The statutory scheme for defect cases and how it was applied herein are set forth in Ford's Jurisdictional Statement (Juris. State.) 6-10.

defect. Obviously, with no criteria, there can be good faith differences of opinion as to whether in a given case there is a safety-related defect. It is the fair resolution of those differences with which we are here concerned.

AIA submits that there cannot be a fair resolution of those differences in defect cases without the manufacturer's being able to fairly present its side and to respond to the agency's charges in a due process hearing, free from threats of enormous penalities and costs merely for seeking the due process hearing. To threaten to add extraordinary costs and a penalty against a manufacturer in defect cases would be like threatening to impose punitive damages in a simple negligence case where the standards of what constitutes negligence in a given factual situation cannot be known in advance of the due process hearing.

Up until this time, the only companies to judicially challenge an agency order to conduct a safety-related defect notification or recall campaign have been the two behemoths of the motor vehicle industry, General Motors Corporation (GM) (four separate agency defect orders were involved in: *United States v. General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975); *United States v. General Motors Corp.,* D.D.C., Civ. No. 75-277; *United States v. General Motors Corp.,* D.D.C., Civ. No. 75-0049 and *United States v. General Motors Corp.,* D.D.C., Civ. No. 75-0050 and Ford (two separate agency defect orders were involved in *United States v. Ford Motor Company,* D.D.C., Civ. No. 76-0046 and herein). Only these two companies have faced the risk of a penalty of up to $800,000 for noncompliance with the agency order if the court finds a safety-related defect exists, and the additional risk of either another penalty of up to $800,000 or the cost of a provisional notification.

But the provisions of the Traffic Act establishing the two $800,000 civil penalities and the provisional notification procedure hit the smaller companies harder, for the threatened costs are relatively fixed[7] and represent a much greater part of the cost of doing business in the United States for the smaller companies.[8] Until now, the smaller companies have been, at best, a footnote in some other company's case.[9] Thus, even more so than for GM and Ford, the effect of these provisions is to deny the smaller companies any real opportunity for a due process hearing.[10]

The present situation simply overwhelms the smaller companies. For example, contract the 625,000 vehicles involved in this case (Juris. State. 7) with a claimed defect in 800 replacement brake hoses retailing for perhaps $3.00 each. The penalty faced by the brake hose manufacturer, should it seek a due process hearing and

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[7]The maximum $800,000 penalty is quickly reached since the penalty accrues at the rate of $1000 per vehicle or item of equipment involved.

[8]By smaller companies, we mean substantially smaller than GM and Ford by any standard, including total assets, net capital, total sales in dollars or motor vehicle sales in units. Smaller companies include not only AIA companies but domestic companies like Checker, Excalibur, Avanti, and a host of truck manufacturers as well as parts manufacturers.

[9]*E.g.*, Juris. State. 16.

[10]Even Judge Hart in his dissent below seems to have overlooked the plight of the smaller companies when he stated:

> "The 'fair price of adventure' is too high, and the argument that *automobile manufacturers may be able to afford such penalties* does not overcome the inevitably chilling effect which the penalty provisions instill." (Emphasis added.) Juris. State. Appendix (App.) 49-A.

lose, is up to $800,000 on goods retailing for $2400. In addition, it faces the possibility of a provisional notification order. If that order were issued and the manufacturer refused to comply with the order, it would face another penalty of up to $800,000, whether or not the court found that the brake hoses actually contained a safety-related defect. If it complied with the provisional notification order, the cost of preparing, printing and mailing the notices alone would surely exceed the $2400 retail value. There is, of course, only one practical thing for the brake hose manufacturer to do: comply with the agency recall order, whatever its merits, and replace the questioned hoses.

This example is extreme. But less extreme and very real are the same problems for the $40 tire manufacturer, the low-volume $3000 automobile manufacturer, even the low-volume $10,000 luxury car manufacturer. In each case, the risks are simply too great to take, resulting in compliance with an order of questionable validity. It is no answer, therefore, for District Courts to say to the smaller companies that

> "... it is hardly reasonable to argue that General Motors, one of the largest corporations in the world, would forego judicial review simply because there is a possibility that if it loses it may be assessed anywhere from one dollar to four-hundred thousand dollars." *United States v. General Motors Corp.* 385 F. Supp. 598, 604 (D.D.C. 1974)

or

> "Even in gross, the $800,000 figure must be taken in conjunction with the fact that the class which will be affected – manufacturers or assemblers of motor vehicles or motor vehicle equipment – will not be denied access to the courts. It may well be within

the range of the cost of litigation for such challenges." App. 22-A

This result, of limiting if not foreclosing due process proceedings, is no accident. As noted by Judge Hart in his dissent:

> "The legislative history of the amendments indicates that the absence of due process elements at the agency level was no accident. Indeed, the Conference Report on the bill which became the 1974 amendments rejected the Senate's proposal which would have required the Secretary of Transportation to provide the manufacturer with 'a statement of his reasons and basis for the findings of a safety-related defect' and would have granted the manufacturer a limited right of a cross-examination. H.R. Rep. No. 93-1452, 93rd Cong., 2d Sess., at 24 (1974)." App. 35-A.

Even the District Court majority was forced to concede as much while making an effort to make a virtue of this vice by arguing that it was needed in order to deter "frivolous litigation" and to provide "prompt corrective action" for the alleged defects. App. 25-A. Neither supposed need justifies the drastic effect of deterring nonfrivolous, indeed, meritorious, litigation. Moreover, the effects of virtually foreclosing even meritorious litigation will necessarily include encouraging the agency to ignore the manufacturer's rights and press unjustified recalls at the expense first of the manufacturer, but ultimately of the consumer. If "prompt corrective action" is appropriate, the mechanism exists since the agency can set the date for compliance with its order (15 U.S.C. §1413(b)) and promptly seek judicial enforcement if compliance is not forthcoming. These matters are wholly within the unchallenged powers of the

agency and the courts. In short, AIA submits that it would be better to put the burden on the agency should the feared extraordinary case arise, rather than to consciously and consistently deny manufacturers due process.

The public confirmation of what had been informally impressed upon the smaller companies did not go unnoticed, namely the agency's testimony before Congress that "whenever an action is forwarded to the Justice Department to collect a civil penalty the maximum authorized by law is sought." Hearings Before the House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce on H.R. 7505, 93d Cong., 1st Sess., at p. 388 (1973). Smaller companies are not faced with a *possible* $800,000 claim, they are faced with a *certain* $800,000 claim – the same as GM and Ford. At best, the smaller companies are left to speculate on what the judicially established penalty might be. It can be no surprise that in the nine years since enactment of the Traffic Act, only GM and Ford have failed to acquiesce in the agency's recall orders, even though it was barely a year ago that the maximum penalty was raised to $800,000 from $400,000.

Another evil in this policy of systematically limiting judicial scrutiny of the agency's recall orders is that as the recall campaigns are ordered and carried out by manufacturers, a body of administrative precedent is established. The effect of all unchallenged agency recall orders – some of which are unchallenged only out of fear of enormous penalties or the acceptance of the lesser of evils – is compounded as the unchallenged recall orders encourage similar and even less meritorious agency recall orders in the future.

As emphasized by Judge Hart (App. 46-A):

> "[T]he right to a judicial review must be substantial, adequate and safely available – but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. *Wadley Southern Ry. v. Georgia*, 235 U.S. 651, 661 (1915)."

If these words of this Court are to be any more than mere words, then 15 U.S.C. §§1397, 1398, 1412 and 1415(c) as applied to safety-related defect cases, are unconstitutional as violating the Fifth Amendment.

B. The Provisional Notification, Standing Along, on its Face and As Applied, Is Repugnant to the Constitution.

However unfair may be the $800,000 penalty facing a manufacturer for testing the agency's recall order, it cannot compare for repugnancy to the Constitution with the "provisional notification" provisions. While the former at least permits a prevailing manufacturer to escape the fact, if not the threat, of the penalty, the provisional notification provisions do not. Even if a manufacturer eventually prevails, it faces a penalty if it fails to comply with an agency order to send out the provisional notification at the manufacturer's own expense.

The litany of horrors arising out of the provisional notification procedure is almost incredible:

- after a non-due process proceeding, the agency enters a recall order and, should the manufacturer demand a due process proceeding, the agency can, based on its own non-due process order, require

  the manufacturer to expend large amounts of its own funds on a notice to owners emphasizing that non-due process order;
- there is no judicial review permitted on the validity or propriety of the provisional notification order; thus, never a due process proceeding on the order;
- for failure to comply with the provisional notification order, the manufacturer faces an $800,000 penalty even if it wins on the merits of the defect controversy;
- if the manufacturer complies with the provisional notice order –
  - it must disparage its own goods to its own customers – even if not true (15 U.S.C. §1415 (b) (A) - (D))
  - it may only state the agency's side of the controversy (15 U.S.C. §1415(b)(B) and (C); agency proposed amendments to 49 C.F.R. Part 577, new §§577.6(b), 577-8, 40 *Fed. Reg.* 19651, 19655, 19656 (May 6, 1975)), an apparent violation of the Constitution's First Amendment freedom of speech provision; and
  - it must imply that it is appealing a valid order and has some burden to overcome (15 U.S.C. §1415(b)(E)), when in fact it is seeking its first opportunity for a due process hearing where the agency has the burden of proof.

In practical effect, the manufacturer must decide whether it is worth the risk of the $800,000 penalty to avoid product self-disparagement and the considerable cost of the provisional notice. For the smaller company, the risk of the enormous penalty virtually forces compliance. Therefore, in deciding whether or not to seek a due process proceeding on the basic recall order, the smaller

company must take into account the adverse impact of the cost of any provisional notification (which, as noted above, might be far more than the cost of repair or replacement) and the adverse effect of the agency-ordered and non-judicially reviewable self-disparagement. All of which has a most "chilling effect," to say the least, on whether to seek a due process hearing.

C. The District Court Construction of the Provisions in Question Fails to Bring Them Within Constitutional Limits.

With regard to the provisional notification issue, the District Court declined to try to rehabilitate this procedure, preferring instead to avoid the issue by declaring that it was not ripe for decision because the agency has not actually ordered a provisional notification in this case. App. 10-A. However, at the time Ford filed its suit herein, neither had the agency sought the $800,000 penalty.

The chilling effect of the provisional notification scheme remains severe as a threat, if not yet a fact, to Ford. If this issue is not now ruled upon, it will continue as that threat for Ford and all other companies, and apparently the only way it could ever be challenged would be for some company to risk the $800,000 penalty for failure to comply – a risk certainly no smaller company could afford to take.

It is noteworthy that Judge Hart in his dissent found no difficulty seeing the issue ripe for consideration (App. 36-A) and recognizing many of its shortcomings:

> "The provisional notification portion of the Act as amended cannot stand insofar as it summarily assigns civil penalties for failure to comply based on an administrative determination arrived at without procedural due process safeguards for the manufacturer; prior to judicial testing of the validity of the agency determination; and without regard for the ultimate disposition of the case. Therefore, I would find the provision unconstitutional as contravening the due process clause of the Fifth Amendment." App. 41-A.

With regard to the $800,000 penalty for failure to comply with an agency recall order, the District Court sought to bring it within Constitutional limits by (1) holding that a hearing on a motion for a preliminary injunction against enforcement would suffice for the requisite due process hearing, and (2) creating a unique burden of proof theory ereby the moving party for a preliminary injunction need only show that the evidence is in equipoise.

The District Court's first point, using the preliminary injunction as a "quickie" due process fulfillment, fails to bring the penalty within constitutional limits. Despite the District Court's repeated implication that seeking the preliminary injunction would be risk-free (App. 18-A, 21-A, 13-A), the fact is, it could not be. If a manufacturer unsuccessfully sought the preliminary injunction and then complied with the agency recall order rather than proceed to a full hearing, it would still be liable for the penalty because, in all likelihood, it would have failed to issue the recall order within the time specified by the agency.[11] 15 U.S.C. §1415(c)(1) plainly states that the

[11] It is no answer to suggest that the agency would probably act reasonably and not seek a penalty in such circumstances for, first, it is the *threat* which chills the invocation of judicial proceedings and, second, there is no reason to believe the agency would act any more reasonably than when the agency publicly announced that it would always seek the maximum penalty regardless of the size of the manufacturer involved or any extenuating circumstances surrounding the alleged defect case. See p. 9, *supra*.

penalty abates only "with respect to any period for which the effectiveness of the order was stayed." If there is no stay, there is no abatement. Thus, the District Court's theory fails to meet its own test that:

> "... the basic constitutional requirement is satisfied if the manufacturer has an opportunity to convince a court that its ground [sic] for contesting the validity of the order are substantial, and the adequacy of that opportunity is established where it is made available *before liability for noncompliance attaches.*" (Emphasis added.) App. 12-A.

As shown, the preliminary injunction procedure is still not an opportunity for a due process hearing "before liability for noncompliance attaches."

The District Court's equipoise of evidence theory is by its own admission "novel in formulation" (App. 19-A). Judge Hart deals with the theory more harshly:

> "... [the equipoise theory] runs afoul of the plain and accepted meaning of burden of proof and the specific words of the statute. The law is and has always been that where the proof is in equipoise the party who has the burden of proof has not met that burden and cannot prevail. Nor do the words of the statute provide that all the manufacturer must only mount such evidence as meets the government's submission." App. 32-A.

Little can be added to Judge Hart's statement except to note the statutory language he refers:

> "The court shall restrain the enforcement of such an order only if it determines ... that the manufacturer has demonstrated that he is likely to prevail on the merits." 15 U.S.C. §1415(c)(1).

CONCLUSION

AIA agrees with the District Court's statement that:

> "... the Constitution is offended when the penalty system is of such a nature as to create a virtual roadblock to judicial review." App. 14-A.

We submit, however, that we have shown how the penalty and provisional notification provisions do "create a virtual roadblock to judicial review" for, at least, the smaller companies. Accordingly, AIA respectfully submits that the federal questions presented in this case are substantial and warrant this Court's plenary review.

Respectfully submitted,

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